SUPREME COURT, U. S. 73-236
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

73-

No. 236

NEW JERSEY CITIZENS FOR CLEAN AIR, INC., *et al.*,

Petitioners,

vs.

NEW JERSEY SPORTS AND EXPOSITION AUTHORITY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the New Jersey Supreme Court affirming the state administrative agency hearing involved is reported in *In re Sports Complex Hackensack Meadowlands,* 62 N. J. 248, 300 A. 2d 337 (1973). The opinion directing the hearing and defining its scope is reported in

New Jersey Sports and Exposition Authority v. *McCrane*, 61 N. J. 1, 292 A. 2d 545 (1972), appeal dismissed 409 U. S. 943 (1972). This latter opinion upheld the constitutionality of the New Jersey Sports and Exposition Authority Law. N.J.S.A. § 5:10-1 *et seq.*

Jurisdiction

The Petitioner purports to predicate jurisdiction upon 28 U.S.C. §1257(3).

Questions Presented

1. Whether this Court should review the affirmance by the highest court of the State of a factual determination by State administrative agencies made pursuant to a State statute of limited application?

2. Whether this Court should entertain a Petition which seeks to invoke as the basis for this Court's jurisdiction Federal Regulations which were not even proposed until after the determination by the Supreme Court of New Jersey, did not become effective until after the filing of the Petition with this Court, and have not yet been implemented in accordance with their terms?

Statutes and Regulations Involved

The statutes and regulations primarily involved in these proceedings are the following:

1. Section 23 of the New Jersey Sports and Exposition Authority Law. N.J.S.A. § 5:10-23.

2. Sections 110, 304 and 307 of the Clean Air Act. 42 U.S.C. §§ 1857c-5, 1857-2 and 1857-5.

3. The "Complex Source" regulations promulgated pursuant to the Clean Air Act, 38 Fed. Reg. 15834 (1973), on June 18, 1973.

Statement of the Case

This case was previously before this Court on a prior appeal from the Supreme Court of New Jersey which was dismissed for want of a substantial federal question. In the prior proceedings the Supreme Court of New Jersey had upheld the constitutionality of the New Jersey Sports and Exposition Authority Law. This law created the New Jersey Sports and Exposition Authority (herein referred to as "the Authority"), a public body corporate and politic empowered to build a sports complex in the Hackensack Meadowlands in the State of New Jersey. N.J.S.A. 5:10-6 a. The Authority is authorized to issue revenue bonds for its public purposes and is given the right of eminent domain. N.J.S.A. 5:10-6 b., 9 and 10. One section of the statute is pertinent to the present Petition:

> "It is the express intent of the Legislature that the authority in undertaking the meadowlands complex shall consult with the Meadowlands Commission and the Department of Environmental Protection* with respect to the ecological factors constituting the environment of the Hackensack meadowlands to the end that the delicate environmental balance of the Hackensack meadowlands be maintained and preserved." (N.J.S.A. 5:10-23).

---

* Herein referred to simply as the Hearing Agencies.

The Supreme Court of New Jersey construed this statute in *New Jersey Sports and Exposition Authority* v. *McCrane, supra,* 61 N. J. at 32-33, 292 A. 2d at 561:

> "In view of the legislative history and particularly the strong language of section 23, we are unanimously of the view that an obligation has been imposed upon the Authority to present its proposal for site location to the Meadowlands Commission and the Department of Environmental Protection, and seek their opinion that in using such site the 'delicate environmental balance of the Hackensack meadowlands may be maintained and preserved.' This presentation should be made after public notice of the time and place thereof, and actual notice to the parties to the present action. At such time the Authority and all interested persons should be permitted to present their views on the subject. Although section 23 speaks of the Meadowlands Commission and the Department of Environmental Protection, we see no reason why the presentation could not be made to both agencies at the same time. In our view the full record should be and can be made expeditiously at that time, to the end that if any further review is sought it may be heard and disposed of upon that record."

The hearing which is the subject of this Petition thus was held solely pursuant to Section 23 of the New Jersey Sports and Exposition Authority Law. It was not held pursuant to any other statute or regulation, state or federal. The hearing, which commenced on July 10, 1972 and continued daily for an uninterrupted period of five weeks until it was concluded on August 11, 1972, covered

a wide range of environmental matters (all scientific and factual in nature) including the following:

1. The ecology of the Hackensack Meadowlands Region;
2. The location of the proposed Sports Complex within the Meadowlands;
3. Alternative sites considered;
4. Land form and geology of the area;
5. Vegetation of the area;
6. Wildlife of the area;
7. Water quality in the area;
8. The site plan;
9. The proposed site work;
10. Availability of electric energy;
11. Availability of an adequate potable water supply;
12. Availability of adequate sanitary sewage capacity;
13. Storm water runoff;
14. Disposal of solid wastes generated by the Sports Complex;
15. Disposition of excavated material unsuitable for foundations;
16. Volume and source of fill to be used during construction;
17. Noise pollution;
18. Traffic; and
19. Air quality.

It is not Respondent's intention to comment upon the voluminous factual record which was made before the Hearing Agencies during the 25 days of hearings, nor upon Petitioners' inaccurate and sometimes misleading characterization of the facts since they are largely irrelevant to a determination of this Petition.

On September 25, 1972, the Hearing Agencies issued their findings (Pet. App. 244a-261a).* With regard to air pollution the Hearing Agencies specifically determined that it was unlikely that any of the federal ambient air quality standards (40 C.F.R. 50.1 *et seq.*) promulgated pursuant to Section 109 of the Clean Air Act (42 U.S.C.A. §1857c-4) would be violated when the sports complex becomes operational in 1975, and measures were included in their decision to insure that they would not be. (Pet. App. 260a-262a). These findings were accepted and adopted by the Commissioner of the Department of Environmental Protection and the Chairman of the Hackensack Meadowlands Development Commission (Pet. App. 262a-263a).

On appeal to the Supreme Court of New Jersey, that Court concluded that "the kind of hearing we suggested was held", and affirmed the determination of the Hearing Agencies. *In re Sports Complex Hackensack Meadowlands,* 62 N. J. 248, 300 A. 2d 337 (1973). In its opinion the Supreme Court made the following comments with regard to the questions raised by Petitioners as to air pollution:

> "A considerable part of the hearing was concerned with projections of the impact of the complex on air quality from the broad point of view of the public health. While the statutory obligation imposed on the Authority to consult with the named agencies was concerned only with the 'delicate environmental balance' of the meadowlands, our remand was sufficiently comprehensive to include the broader issue and the hearing agencies rightly concerned themselves with it.

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* References are to the Petitioners' Appendix.

"• • • It is also argued that projections of air pollution emanating from the completed project indicate that standards established under the Federal Clean Air Act (42 U.S.C.A. §1857, et seq.) will be violated and will result in a denial of due process and equal protection, as well as infringe on the implicit constitutional right to a healthful environment. As a corollary, the argument is made that it is beyond the police power of the State to allow the construction of a project demonstrably dangerous to the public health.

"*These contentions lack validity. It has not been demonstrated that the complex will be dangerous to the public health. Careful consideration was given to the question of air pollution.* The record indicated that on-site facility emissions from the complex will be of minor significance on air quality and that the real concern was with motor vehicle emissions.

• • •

"The hearing agencies found that the complex will not interfere with the State of New Jersey achieving the national ambient air quality standards for sulphur dioxide, particulates, and oxidents (since oxident standards will be achieved by 1975 the hydrocarbon standard does not apply). It was also found that under conditions of extreme atmospheric stagnation and high football activity, motor vehicles in the complex could conceivably cause the national standard for carbon monoxide to be exceeded, but not more than once per season.* As

* The national standard for carbon monoxide is 35 ppm. "not to be exceeded *more* than once per year." (40 C.F.R. 50.8).

heretofore noted, the approval given the site and proposed use calls for establishment of a monitoring system to detect air pollution with alternative specifics to achieve and maintain acceptable air quality.

"Actually, it is highly speculative to try and estimate air pollution in 1975 when the project will have completed its race track, football stadium and parking area, or in 1990 when the entire complex is scheduled for completion. There are too many variables in the overall picture." 62 N. J. at 253-55, 300 A. 2d at 340. (Emphasis added).

The Supreme Court of New Jersey then went on to point out that "certainly the Sports Authority will be subject to the Clean Air Act," that in the development and operation of the sports and exposition complex the Authority must conform to federal standards, and that the "act empowers the Federal Administrator to bring suit directly in the federal court to restrain air pollution in violation of the established standards should any state fail to enforce its implementation plan effectively." 62 N. J. at 255, 300 A. 2d at 340-1; 42 U.S.C. §1857c-8.

The Supreme Court of New Jersey rendered its decision on February 5, 1973, and on February 15, 1973 Petitioners filed a Petition for Rehearing which was denied on March 6, 1973. On March 19, 1973 they filed a "*Re*petition for Rehearing". This is a paper which does not exist under New Jersey appellate practice and if considered merely as a Petition for Rehearing was out of time. (Rule 2:11-6 of Rules Governing the Courts of the State of New Jersey). The *Re*petition for Rehearing was likewise denied on May 2, 1973. As will hereinafter appear both the Petition and the *Re*petition raised new

matters not previously considered which are now being asserted as the basis for the Petition for Writ of Certiorari filed with this Court.

Reasons for Denying the Petition

What is basically involved in the Petition before this Court is a factual determination by state administrative agencies made solely pursuant to a state statute of limited application, and the scope of judicial review thereof as a matter of state law. The hearing was not held pursuant to the Federal Clean Air Act; it did not involve the validity of a state implementation plan promulgated under that Act; and it did not affect or impair plaintiff's rights under that Act. Under the circumstances the Petition should be dismissed for want of a substantial federal question.

I.

Plaintiffs' Rights Under The Clean Air Act Remain Unimpaired By The Proceedings Below

It is perhaps significant that Petitioners fail to define with precision what rights under the Clean Air Act were denied them or their members* in the proceedings below, and what sections of that statute define those rights. Since the sports complex will not be completed for several years Petitioners cannot complain of the present violation of any rights. The Supreme Court of New Jersey was

* It is submitted that as alleged environmental groups the Petitioners have no rights separate from the rights of their members which they have standing to assert in any event under the Clean Air Act. *Sierra Club* v. *Morton*, 405 U.S. 727 (1972).

careful to point out that "the Sports Authority will be subject to the Clean Air Act" and that "in the development and operation of the sports and exposition complex the Authority must conform to" the federal ambient air quality standards. If the Authority should fail to comply with those standards (or with any other requirement of the Clean Air Act) in the future, Petitioners' remedy lies in the citizens' suit provisions (Section 304) of that Act to protect those rights. (42 U.S.C.A. §1857h-2).

The speculative nature of Petitioners' position in these proceedings is illustrated by their reference to "two actions presently pending which could have a substantial effect on this case and petitioners' rights thereunder." (Pet. 23). The first, *Marianne Wuillamey et al.* v. *David A. Werblin, et al.*, was a suit instituted in the United States District Court for the District of New Jersey on July 26, 1973 to enjoin construction of the sports complex. The plaintiffs were the President and the Chairmen of three of the alleged environmental groups which are Petitioners before this Court (Pet. App. 319a). That suit was dismissed on August 28, 1973 under Rule 12(b) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted, the court observing that "the completed Complex will of course have to comply with whatever final pollution standards are promulgated under the authority of the Clean Air Act," and that an estimate of possible air pollution generated by the Complex in 1975 after it is completed "is, at best, highly speculative." (Resp. App. 3a, 7a, 9a). The second was a letter sent by Petitioners on July 26, 1973 to the Administrator of the Environmental Protection Agency demanding that he proceed pursuant to 42 U.S.C.A. §1857c-8 to prevent construction of the Authority's parking facilities which were alleged to be in violation of the transportation control plan "imposed" on the State of New Jersey by the

Administrator (Pet. App. 315a). The Administrator quite properly pointed out in his reply dated August 16, 1973 that the parking lot construction review provision upon which Petitioners relied was really only "a notice of proposed rulemaking, pursuant to Section 110(c) of the Clean Air Act," and that final regulations would be promulgated by October 15, 1973, citing 38 Fed. Reg. 17782, 17790 (July 3, 1973). He also pointed out that Petitioners' remedy, as provided by Section 304 of the Clean Air Act, is a suit against one who is alleged "to be in violation" of an emission standard under the Act. 42 U.S.C.A. §1857h-2(a) (Resp. App. 1a). Petitioners do of course concede that the sports complex (which will not be completed for several years) is not presently in violation.

II.

The Proceedings Below Did Not Involve The Validity Of New Jersey's Implementation Plan Under The Clean Air Act

Section 110 of the Clean Air Act prescribes the administrative procedure for the promulgation and adoption of plans for the implementation, maintenance, and enforcement of the federal ambient air quality standards within each State. 42 U.S.C.A. §1857c-5. The portions of the Act which are here pertinent became effective on December 31, 1970 and required each state to prepare a plan for implementing federal ambient air quality standards to be promulgated by the Administrator of the Environmental Protection Agency. 42 U.S.C.A. §§1857c-4, 1857c-5. The Administrator promulgated these standards on April 30, 1971. 36 Fed. Reg. 8186 (1971); 40 C.F.R. 50.1 *et seq.*

New Jersey's implementation plan was timely submitted to the Administrator on January 26, 1972. 38 Fed. Reg.

17782 (1973). At that time, as permitted by the Act, §1857c-5(e)(1), a number of States (including New Jersey) requested extensions of time to comply with certain of the standards. On May 31, 1972 the Administrator approved New Jersey's plan, granting the extensions as requested. 37 Fed. Reg. 10842 (1972).

Contrary to the suggestion of the Petitioners (Pet. 10, 16, 17) the validity of New Jersey's implementation plan was in no way involved in the proceedings below which was not the proper forum in which to contest validity in any event (as will hereinafter appear). Indeed it was not until after the Supreme Court of New Jersey had rendered its decision on February 5, 1973 that the Petitioners asserted for the first time in their Petition for Rehearing filed February 15, 1973 that New Jersey's implementation plan was invalid (Pet. App. 273a *et seq.*). The basis for this assertion was unrelated to the sports complex. It was a case decided fifteen days before by the United States Court of Appeals for the District of Columbia. *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency,* 475 F. 2d 968 (D. C. Cir. 1973). In that case the Court of Appeals decided that the Administrator had erred in granting extensions to the several states. In ordering those extensions rescinded the Court carefully prescribed procedures to implement its decision. Those procedures have been and are being carefully followed under the close scrutiny of the Court of Appeals (Resp. App. 12a-18a). In the case of New Jersey the Administrator proposed an implementation plan for the State on July 3, 1973. 38 Fed. Reg. 17782.* The plan was to have become

* It is intimated in the Petition (p. 19) that the Sports Authority was delinquent in failing to obtain a permit to build a new parking facility in the sports complex. However, as indicated above, the transportation control plan of which these provisions covering new parking facilities are but a part is only *proposed* by the Administrator.

effective on August 15, 1973, after a series of public hearings and opportunity to submit written comments, which it was acknowledged "may lead the Administrator to adopt final regulations that differ in important ways from this proposal." 38 Fed. Reg. 17782, 17787, (1973).

The Court of Appeals for the District of Columbia, however, has recently granted the Administrator's request that the deadline for promulgation of all such plans be extended to October 15, 1973. 38 Fed. Reg. 21505 (Aug. 9, 1973). When New Jersey's implementation plan is ultimately adopted (and in whatever form), Petitioners' sole right of review will lie in the United States Court of Appeals for the Third Circuit. 42 U.S. C.A. §1857h-5(b)(1); *The Anaconda Company* v. *Ruckelshaus,* —— F. 2d —— (10th Cir., August 8, 1973). That right of review was not impaired by the proceedings below.

III.

The Complex Source Regulations Were Not Proposed Until After The Opinion Below, Have Not Yet Been Implemented, And Can Have No Bearing On These Proceedings

Throughout the Petition it is intimated that the federal "Complex Source" regulations and the review procedures which remain to be prescribed thereunder have some bearing on the proceedings below. (Pet. 3, 11, 14, 18, 21, 22, 24, 25, 27, 29, 34). Petitioners first attempted to inject these regulations into this case in their "*Re*petition for Rehearing" filed out of time over a month after the decision of the New Jersey Supreme Court. The *Re*petition was filed on March 19, 1973 "on the basis of a

new regulation issued on March 8, 1973" according to Petitioners. (Pet. App. 289a). Actually this statement was somewhat misleading. What was involved was not in fact a new regulation, but an announcement by the Administrator of the Environmental Protection Agency of his intention to draft a new regulation governing the construction of facilities ("Complex Source") which may result in increased emissions from motor vehicle activity. The announcement indicated that the regulation would "further provide that each State must have procedures whereby, prior to construction or modification of such sources, the State will be able to determine whether the construction or modification of the complex source would cause violations of a control strategy or interfere with the attainment or maintenance of the national ambient air standards." 38 Fed. Reg. 6279-80.

Following this advance notice, the proposed regulations were published on April 18, 1973. 38 Fed. Reg. 9599. On June 18, 1973 the "Complex Source" regulations as finally adopted were promulgated. 38 Fed. Reg. 15834 (1973).

It is clear that these new regulations as promulgated have yet to be implemented, and as such have no independent force or effect even today. Under the terms thereof all States were required to submit revisions of their implementation plans to comply with the new requirements involving procedural review of new "Complex Sources", no later than August 15, 1973. After submission the Environmental Protection Agency has two months (until October 15, 1973) to review and approve or disapprove the revisions and an additional two months (until December 15, 1973) to propose and promulgate regulations to replace any disapproved State procedures. 38 Fed. Reg. 15834-5.

We are not aware that "Complex Source" review procedures have been approved as yet by the Environmental Protection Agency for any of the 50 states (including New Jersey). Although it may be conceded that the regulations contemplate some uniformity in these review procedures (38 Fed. Reg. 15834, 36), it is difficult to conceive how such review procedures can be applied (when they are finally promulgated and approved) to an administrative hearing which was held over a year before their adoption (as Petitioners apparently are suggesting in Points I and II of their Petition).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Of Counsel:

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Certificate of Service

I, JAMES C. PITNEY, a member of the Bar of the Supreme Court of the United States, hereby certify that on this 19th day of September, 1973, three copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari were served by first class mail, postage prepaid, on the following attorneys:

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I further certify that all parties required to be served have been served.

JAMES C. PITNEY,
570 Broad Street,
Newark, New Jersey 07102,
Attorney for Respondent.

APPENDIX A

Letter from United States Environmental Protection Agency to Frederick C. Mezey, dated August 16, 1973

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D. C. 20460
August 16, 1973

Office of
Enforcement and General Counsel

Mr. Frederick C. Mezey
Mezey and Mezey
Counsellors at Law
93 Bayard Street
New Brunswick, New Jersey 08903

Re: No. 5606

Dear Mr. Mezey:

The Administrator has asked me to reply to your letter of July 26, 1973.

The parking lot construction review regulation to which you refer in your letter was not "imposed" on the State of New Jersey on June 22, 1973. Rather, it constituted a notice of proposed rulemaking, pursuant to Section 110(c) of the Clean Air Act, 38 Fed. Reg. 17782, 17790 (July 3, 1973). Final regulations on transportation controls will be promulgated by October 15, 1973.

In addition, because enforcement of an implementation plan by the Environmental Protection Agency falls within the category of prosecutional discretion, it is our opinion

that non-enforcement in a particular instance does not constitute a non-discretionary duty of the Administrator under Section 304 of the Act. The appropriate use of Section 304 in such situations is to commence a civil action against the alleged violator of the implementation plan.

Sincerely,

ROBERT L. BAUM
Associate General Counsel
Air Quality and Radiation Division

cc: Mr. Gerald M. Hansler, Regional Administrator
Mr. Martin Green, Department of Justice

APPENDIX B

Opinion and Order of the United States District Court, District of New Jersey, *Marianne Wuillamey, et al.* v. *David A. Werblin, et al.*

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MARIANNE WUILLAMEY, BARBARA EISLER and JAMES DRAGO,
Plaintiffs,

v.

DAVID A. WERBLIN and RICHARD J. SULLIVAN
Defendants.

CIVIL ACTION No. 1099-73

Appearances:

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Attorneys for Plaintiffs

PITNEY, HARDIN & KIPP
By: JAMES C. PITNEY, Esq.
Attorneys for Defendant David A. Werblin

JOSEPH M. CLAYTON, JR., Deputy Attorney General
Attorney for Defendant Richard J. Sullivan

COOLAHAN, District Judge:

This is a suit brought by certain individuals and environmental organizations, on behalf of themselves and

those similarly situated, seeking an injunction under Fed. R. Civ. Pro. 65 against construction of the Hackensack Meadowlands Sports Complex authorized under the New Jersey Sports and Exposition Authority Law, N.J.S.A. 5:10-1 *et seq.*[1] Plaintiffs also seek a judgment to the effect that the New Jersey statute is fatally inconsistent with the Clean Air Act, 42 U.S.C. § 1857 *et seq.*, and must therefore be enjoined under the Supremacy Clause. *Gibbons* v. *Ogden*, 22 U. S. (9 Wheat.) 1 (1824).

Federal jurisdiction is based on the claim that the state statute conflicts with a federal statute which, by virtue of the Supremacy Clause, is controlling. As stated in *Swift & Company* v. *Wickham*, 382 U. S. 111 (1965) at 127, ". . . cases of conflict [of a state statute] with a federal statute . . . follow their normal course in a single-judge [federal district] court." Other bases alleged for jurisdiction of this court are 28 U.S.C. § 1331 (federal

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[1] Among the environmental and conservationist organizations are New Jersey Citizens for Clean Air, Inc. (whose president is plaintiff Eisler), Hoboken Environment Committee, Hudson River Fisherman's Association, Weehauken Environment Committee, C.A.P. A.B.L.E., Save the Palisades Association (chairman Drago), Citizens Committee of Hudson County, and the Hudson County Citizens for Clean Air.

Defendant Werblin is the Chairman of the New Jersey Sports and Exposition Authority. Defendant Sullivan is the Commissioner of the New Jersey Department of Environmental Protection.

This Opinion will not address the question of whether this action is, or can be brought under Fed. R. Civ. Pro. 23 as a class action.

question) and 42 U.S.C. § 1857h-2(a) (establishment of citizen's right to bring suit under the Clean Air Act).[2]

No party to this proceeding has addressed the question of whether these particular plaintiffs, as individuals, possess the requisite standing to bring suit. For a plaintiff to possess standing, there must be claimed injury to a *legally protected* interest, *i.e.*, ". . . a wrong which directly results in the violation of a legal right." *Alabama Power Company* v. *Ickes,* 302 U. S. 464, 479 (1938). Although the parties' contentions concern themselves almost exclusively with air pollution, there apparently does not as yet exist a legally protected interest, *per se,* in maintaining pollution-free air. That these plaintiffs, as individuals, do possess sufficient standing to secure this court as a proper forum can, however, be descried from a reading of the policy and purposes of the Clean Air Act itself. As stated in 42 U.S.C. § 1857(a)(2), ". . . the growth in the amount and complexity of air pollution brought about by . . . the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare . . ." And in 42 U.S.C. § 1857(b)(1) it is stated that the purposes of the Clean Air Act include protection and enhancement of ". . . the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." Enact-

[2] The court finds that jurisdiction does not lie under 42 U.S.C. § 1857h-2(a), as that section pertains only to an action brought ". . . to enforce . . . an emission standard or limitation . . .," and to an action in the nature of mandamus against the Administrator of the federal Environmental Protection Agency. Because no final standard or limitation exists, none can be enforced. And the Administrator has not been named as a party-defendant in the present proceedings.

ment of the Clean Air Act into law was plainly intended to protect the health and welfare of, among others, these plaintiffs, who are citizens and inhabitants of the United States. The impairment of the plaintiffs' health that is alleged to be a probable deleterious consequence of construction of the Sports Complex constitutes a sufficiently grave invasion of a legally protected interest to confer standing.

The Sports Complex is currently planned to comprise a large stadium and a race track. The stadium alone is to have a capacity of around 75,000 persons, and parking is to be provided for about 25,000 motor vehicles. The Complex is to be financed by selling close to $270,000,000 worth of bonds, to private investors.

The proposed Complex has produced extensive litigation in the state courts. *New Jersey Sports and Exposition Authority* v. *McCrane*, 119 N. J. Super. 457 (L. Div. 1972), *aff'd as modified* 61 N. J. 1 (1972), exhaustively deals with the state issues presented. See also *In re. Sports Complex Hackensack Meadowlands*, 62 N. J. 248 (1973).

Plaintiffs in the instant litigation seek injunctive relief against the continued construction of the Complex. In this Circuit, there are four "essential criteria" that must be satisfied by one seeking a preliminary injunction. Succinctly put in *Winkleman* v. *New York Stock Exchange*, 445 F. 2d 786, 789 (3d Cir. 1972), these comprise ". . . (1) irreparable harm to appellants absent such stay; (2) absence of substantial harm to other interested parties; (3) absence of harm to the public interest; (4) a likelihood that appellants would prevail on the merits." Plaintiffs' argument appears to be that, unless an injunction issues,

the Complex when constructed and the vehicular traffic it generates must be in violation of the applicable national ambient air quality standards found in 40 C.F.R. § 50.1 *et seq.*

Plaintiffs in the case at bar do not seek to abate a presently existing nuisance. Rather, they seek equitable relief against a possible future violation of federal air quality standards. The extensive hearings conducted between July 10 and August 11, 1972 by the New Jersey Department of Environmental Protection concluded, however, that ". . . the Sports Complex will not interfere with the State of New Jersey achieving the National Ambient Air Quality Standards for sulphur dioxides [sulphur oxides, 40 C.F.R. §§ 50.4, 50.5], particulates [40 C.F.R. §§ 50.6, 50.7], and oxidants photo-chemical oxidants, [40 C.F.R. § 50.9] . . ." Hearing Officers' Report and Recommendations at 55. This finding of fact, though pertaining to events *in futuro,* is sufficiently buttressed by technical expertise to render it unassailable before a court of law. An estimate of possible air pollution generated by use of the Complex in 1975 (its scheduled completion date) is, at best, highly speculative. Such speculation seems entirely to foreclose the plaintiffs' ability to demonstrate that, absent an injunction, they will suffer *any* harm, "irreparable" or other.[3]

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[3] Should use of the Complex cause excessive pollution, those aggrieved have remedy in a suit at common law to abate a public nuisance. Further, 42 U.S.C. § 1857d(k) permits a federal injunction to abate excessive pollution on an emergency basis, on the application of the Attorney General. This section was recently invoked in the United States District Court for the Northern District of Alabama, Pointer, J., to curtail industrial production in Birmingham until a health emergency had abated. See also 42 U.S.C. § 1857d(g)(1), permitting similar abatement across state lines.

Appendix B

Since the plaintiffs at bar cannot carry their burden of showing irreparable harm to them absent injunction relief, it becomes unnecessary to consider the other *Winkleman* criteria. In passing, however, the court notes that, since the harm complained of is entirely *in futuro*, the likelihood is remote that plaintiffs could "prevail on the merits," *i.e.*, demonstrate that the national air quality standards will probably be exceeded. Accordingly, the application for a preliminary injunction against continued construction of the Complex is denied.

The plaintiffs also seek a judgment that N.J.S.A. 5:10-1 *et seq.* is repugnant to 42 U.S.C. § 1857 *et seq.*, and therefore void under the Supremacy Clause. Their attack is premised on the following syllogism: (1) The New Jersey statute, as interpreted by the New Jersey Supreme Court, requires that the Complex be located only in the Hackensack Meadowlands. (2) Placing the Complex in the Meadowlands must cause the national ambient air quality standards to be exceeded in the New Jersey-New York-Connecticut metropolitan region, or at least in that portion of the region adjacent to the Complex. (3) Therefore the state statute permitting the Complex to be constructed violates federal law.

The court is not persuaded by this argument for several reasons. First, as seen *supra*, there is no proof that the Complex will cause federally mandated pollution levels to be exceeded. Second, the New Jersey statute could be superseded by a federal statute *only* if the federal law expressed a Congressional intent to preempt the state's exercise of its power *in the same field*. As stated in *Schwartz* v. *Texas*, 344 U. S. 199, 202-03 (1952), "[i]t will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless

there is a clear manifestation of [Congressional] intention to do so." N.J.S.A. 5:10-1 *et seq.* does not concern itself with air pollution. Rather it simply permits a sports stadium and attendant facilities to be developed in one area of the Meadowlands. Since the subjects dealt with by the juxtaposed statutes are entirely different (an open-air hippodrome and air pollution), no claim can be heard that Congress intended to supercede the state's exercise of power *in the same field.* The completed Complex will of course have to comply with whatever final pollution standards are promulgated under the authority of the Clean Air Act. The court is sure that the Sports and Exposition Authority will obey the law. The fact that the standards may not, at some future point in time, be met does not constitute a question arising under the Supremacy Clause or, apparently, a question of any constitutional dimension. The court concludes that no question of federal preemption of or conflict with a state statute is presented under the Supremacy Clause.

Plaintiffs finally contend that a Clean Air Act regulation, 40 C.F.R. § 52.1590, which appears as part of the New Jersey proposed transportation control plan at 38 Fed. Reg. 17790 (July 3, 1973), has not been complied with by the defendants and that therefore the project is proceeding in violation of federal law. The regulation reads in pertinent part as follows:

> § 52.1590 Management of parking supply.
>
> (a) Definitions:
>
> (1) "Construction" means fabrication, erection, or installation of a parking facility, or any conversion of land to use as a facility.

Appendix B

. . .

(4) "Commenced" means the date on which an owner or operator and a contractor to, or affiliate of such owner or operator, enter into a binding agreement or contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction, modification, or enlargement.

(5) Parking facility (also called "facility") means any facility, building, structure, or lot or portion thereof used primarily for temporary storage of motor vehicles.

(b) This regulation is applicable in all areas within the New Jersey portion of the New Jersey-New York-Connecticut Interstate Region. . . .

(c) No person, after the date of this proposed regulation, shall commence construction of any new parking facility or modify or enlarge any existing parking facility until he has first received from the Administrator or from an agency approved by the Administrator a permit stating that construction, modification, or enlargement of such facility will not interfere with the attainment of applicable Federal Air Quality Standards.

Plaintiffs' contention is that the defendants have never received a permit from the Administrator of the federal Environmental Protection Agency to construct their pro-

posed 25,000 vehicle parking lot. But 40 C.F.R. § 52.1590 is only a *proposed* regulation. 38 Fed. Reg. 21505 (Aug. 9, 1973) reports that the United States Court of Appeals for the District of Columbia Circuit ". . . has granted a request that the deadline for promulgation [of the New Jersey transportation control plan, 38 Fed. Reg. 17782-92] be October 15, 1973.". This court is not prepared to disregard the mandate of the Court of Appeals having direct responsibility for supervision and promulgation of the transportation control plan.

A proposed regulation may be modified or abandoned. It does not have the force of law. Since 40 C.F.R. § 52. 1590 is at this date not final, plaintiffs cannot be heard to complain that it is being violated.[4]

For the foregoing reasons it is ORDERED that the complaint be, and hereby is, dismissed. Costs shall not be awarded either party.

JAMES A. COOLAHAN,
United States District Judge

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[4] The fact that the period during which the public may submit comments in writing to the Environmental Protection Agency has now, under 38 Fed. Reg. 21505, been extended until August 15, 1973 indicates that some parts of the transportation control plan may be modified or abandoned by October 15, 1973. Among these may be 40 C.F.R. 52.1590(c). Only if § 52.1590(c) is promulgated as a final regulation as of October 15, 1973 will the question of whether the phrase "the date of this proposed regulation" refers to July 3, 1973 or October 15, 1973, be ripe for resolution.

APPENDIX C

***Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, Order of March 12, 1973**

(Original Filed—March 12, 1973)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1972

No. 72-1522

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

No. 72-1598

FRIENDS OF THE EARTH, INC., METROPOLITAN WASHINGTON COALITION FOR CLEAN AIR, INC., MS. EUGENIE ANDERSON, ERIC PETER LEVINE,
Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

No. 72-1810

Appendix C

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,

Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

No. 72-1941

NATURAL RESOURCES DEFENSE COUNCIL, INC., FRIENDS OF THE EARTH, INC., MS. HENRIETTA BARLOW, ERIC PETER LEVINE,

Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

No. 72-1982

NATURAL RESOURCES DEFENSE COUNCIL, INC., FRIENDS OF THE EARTH, INC., JONN HERMAN, METRO CLEAN AIR COMMITTEE, CITIZENS ENVIRONMENTAL COUNCIL OF GREATER KANSAS CITY, MARK SHAPIRON,

Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

No. 72-1985

Appendix C

NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

No. 72-2028

NATURAL RESOURCES DEFENSE COUNCIL, INC., FRIENDS OF THE EARTH, INC., COLORADO CITIZENS FOR CLEAN AIR, GERALD L. JENSEN, Esq., MARGA M. RASKIN,

Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

No. 72-2159

NATURAL RESOURCES DEFENSE COUNCIL, INC., FRIENDS OF THE EARTH, INC., PAUL F. McCLAIN, PAM FORDING,

Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

COMMONWEALTH OF KENTUCKY

Intervenor

Appendix C

Before: BAZELON, Chief Judge, WRIGHT and MACKINNON, Circuit Judges.

ORDER

On consideration of respondent's application for modification of this Court's order of January 31, 1973, and of petitioners' memorandum regarding respondent's motion for modification of order, it is

ORDERED by the Court that respondent's aforesaid motion is granted, and the order filed in the above-entitled cases on January 31, 1973, is hereby modified as follows:

Paragraph (4) of the order shall be changed to read as follows:

> (4) The Administrator shall, within two months after the date required for submission of a plan under paragraphs (3) or (9) of this order, approve or disapprove such plan or each portion thereof pursuant to the requirements of Section 110(a)(2), except that approval or disapproval of the portion of the implementation plan to be submitted pursuant to paragraph (9) of this order, to the extent such provisions are also necessary for the attainment of the standards, may be deferred until the time for approval or disapproval specified in that paragraph.

Paragraph (9) of the order shall be modified by deleting the last two sentences and adding the following:

> Respondent shall propose in the *Federal Register* no later than April 15, 1973, amendments to 40 C.F.R. Part 51 which will set forth the require-

ments for State implementation plan procedures necessary for the maintenance of the national standards. Such proposed amendments shall be promulgated no later than June 11, 1973. States shall be directed to submit implementation plan provisions to comply with such regulations no later than August 15, 1973. Such new plans shall be dealt with by the Administrator in the manner set out in paragraphs (4) and (5) of this order.

So ordered.

Dated: March 12, 1973

APPENDIX D

***Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, Order of July 26, 1973**

(Original Filed—July 26, 1973)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1972

Nos. 72-1522, 72-1598
72-1810, 72-1941
72-1982, 72-1985
72-2028, 72-2159

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Before: Bazelon, Chief Judge; Wright and MacKinnon, Circuit Judges

ORDER

On consideration of Respondent's application for modification of this Court's order of January 31, 1973, as modified on March 12, 1973, it is

Appendix D

ORDERED by the Court that paragraph (5) of the order of January 31, 1973, be modified as follows:

(5) If any state fails to comply with the requirements of paragraphs (3) or (9) of this order, or if any state plan is determined by the Administrator not to be in accordance with the requirements of paragraphs (3) or (9) of this order, the Administrator shall prepare, publish, and promulgate regulations setting forth an implementation plan, or portion thereof, for the noncomplying state, following the procedures established in Section 110(c) except that proposal and promulgation of any such regulations shall be made in accordance with the following schedule:

(A) For regulations required due to a State's failure to comply with paragraph (3) of this order—

(i) Proposal of any such regulations by July 24, 1973, and

(ii) Promulgation of any such regulations by October 15, 1973, provided that any regulations requiring review of the construction, modification, or enlargement of parking facilities shall be applicable to such facilities beginning August 15, 1973;

(B) For regulations required due to a State's failure to comply with paragraph (9) of this order—

(i) Proposal of any such regulations by October 15, 1973, and

(ii) Promulgation of any such regulations by December 15, 1973.

Per Curiam

For the Court:

HUGH E. KLINE
Clerk

SUPREME COURT, U.S. 73-236

SEP 26 1973

MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1973

No. A-1154

NEW JERSEY CITIZENS FOR CLEAN AIR, INC., et al.,

Petitioners,

vs.

NEW JERSEY SPORTS AND EXPOSITION AUTHORITY,

Respondent.

ERRATTA

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ERRATTA

Page	Petition
iii	Citation for *Gunther* should be: *Gunther v. San Diego & Arizona Eastern Railroad Co.*, 382 U.S. 257, 86 S.Ct. 368, 15 L.Ed. 2d 308 (1965).
30	Second sentence after section a. should begin: "However, they were well aware that some air quality standards for all automobile related air pollutants were *currently* being violated. . . ."

Appendix

7a	Bold faced "Public Health and Welfare 42 Section 1857c" should be deleted.
15a	Bold faced "Public Health and Welfare" should be deleted.
63a	The following should be added directly above line 6, starting with "permitted by the Eleventh Amendment." Section 1857h-2. *Citizen suits-Establishment of right to bring suit* (a) Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf — (l) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent.
117a	Announcement dealing with Title 32 should be deleted.
124a	Announcement dealing with Title 41, and pages 125a, 126a, and 127a should be deleted.